No. 87-616

# *In the Supreme Court of the United States*

OCTOBER TERM, 1987

HUBERT PARK BECK, DOROTHY FAHS BECK, ROBERT J. BECK and OTTO WEINMANN,
*Petitioners,*

vs.

MANUFACTURERS HANOVER TRUST COMPANY; MILBANK, TWEED, HADLEY & McCLOY; KELLEY DRYE & WARREN; DONALD B. HERTERICH; ISAAC SHAPIRO; and EDWARD ROBERTS, III,
*Respondents.*

## SECOND SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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## FURTHER REASONS FOR ALLOWANCE OF THE WRIT

Petitioners respectfully submit this Second Supplemental Brief, pursuant to Rule 22.6 of this Court, to apprise the Court of recent developments in the Second, Third, Fourth, and Tenth Circuits relevant to its consideration of their petition for certiorari. Each of these developments underscores the necessity for the granting of the petition.

### Second Circuit

In *Krantz v. Schlesinger*, No. CV-86-1637, slip. op. (E.D.N.Y. November 16, 1987) (text of opinion reproduced as Appendix Q), Chief Judge Weinstein dismissed a RICO complaint for failure to adequately plead the "continuing criminal enterprise requirement of RICO, ..." Slip op. at 2, 3; Appendix Q at 165A.

The complaint alleged that defendants had violated RICO by participating in a fraudulent scheme to abandon a condominium offering plan so that a subsequent plan could be submitted containing higher apartment prices. Plaintiffs were purchasers of apartments under the abandoned plan.

Citing the instant case and *United States v. Ianniello*, 808 F. 2d 184 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3229 & 3230 (1987), the Court held that even if the defendants' scheme had lasted for only a year, the complaint adequately alleged a pattern of racketeering activity. Slip. op. at 8, 9; Appendix Q at 170A.

However, citing *Beck*, *Ianniello*, and *Albany Insurance Co. v. Esses*, No. 86-7968, slip op. 5711 (2d Cir. October 15, 1987), the Court dismissed the complaint on the ground

that the "continuing enterprise requirement" was not satisfied: "The Second Circuit requires continuity for both the pattern of racketeering and the enterprise itself. An enterprise with a single purpose, such as fraud, can provide the basis for a Section 1962(c) violation only if the purpose has no obvious terminating goal or date ..." Slip op. at 6; Appendix Q at 169A. "[Here] plaintiffs allege an enterprise ... which defrauded plaintiffs and the Attorney General, and has ceased to function in terms of any criminal activity." *Id.* at 9; Appendix Q at 170A.

Chief Judge Weinstein's opinion accurately states the pattern/enterprise law in the Second Circuit. His dismissal of the complaint was compelled by the cases cited, which apply the Second Circuit rule that a single-purpose enterprise can commit a violation of §1962(c) only if its purpose has no obvious terminating goal or date.*

As is set forth in previous submissions on this petition, the Second Circuit rule (which has also been adopted by the Fifth Circuit) is violative of both the RICO statute and footnote 14 of this Court's opinion in *Sedima S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479, 105 S. Ct. 3275 (1985).

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* The Second Circuit's affirmance of the decision of the District Court was wholly predicated on the failure of the amended complaint to plead a continuing criminal enterprise under §1962(c). 820 F. 2d 46, 48; Appendix D at 28A. Completely ignored by the Second Circuit was the fact that the amended complaint contains ten RICO counts, covering, in the aggregate, *all* of the subsections of §1962. Only two of the counts allege violations of §1962(c). Given its holding that the amended complaint adequately pleads a pattern of racketeering activity, the Second Circuit should at the very least have reversed the District Court with respect to the eight counts not predicated upon §1962(c) violations.

In footnote 14 this Court singled out the term "pattern of racketeering activity" as "differ[ent]" from the other terms set forth in §1961, in that it alone, based on the statutory language and the contents of Senate Report No. 91-617, is susceptible of judicial interpretation. *Id.* at 496, n. 14. No justification for such interpretation exists with respect to "enterprise." The adversion of the Senate Report to "the factor of continuity plus relationship" is expressly limited to "pattern." The Second Circuit's "require[ment] of continuity for both the pattern and the enterprise itself" (*cf. Krantz v. Schlesinger, supra,* slip op. at 6; Appendix Q at 169A), finds absolutely no support in the Senate Report. It is thus grossly violative of both footnote 14 and the definition of "enterprise" in §1961(4).

The Second Circuit rule that a single-purpose enterprise can provide the basis for a violation of §1962(c) only if the enteprise is open-ended is also implicitly violative of §1962(b). That section, which proscribes the takeover of an enterprise through a pattern of racketeering activity, clearly contemplates that a "pattern" can exist for a single-purpose enterprise that has an obvious terminating goal: the achievement of the takeover.

It is clear from §1961(5) that, whatever "pattern" means, the same meaning must be applicable to all of the subsections of §1962, including §1962(c). Since there is no "open-endedness" requirement for a "pattern" under §1962(b), there can be none for §1962(c). The Second Circuit has expressly recognized this by its holding, in the instant case, that the amended complaint adequately alleges a "pattern."

In applying a standard of open-endedness to "enterprise" that does not exist for "pattern" the Second Circuit has engaged in a bootstrap process that stands the statute on its head. First that Court ascribes considerations of

continuity to "enterprise," and predicates its right to do so on this Court's dictum regarding "pattern" in footnote 14 of *Sedima* and the Senate Report on which it is based. In so doing, that Court ignores the fact that the continuity considerations of both footnote 14 and the Senate Report are expressly limited to "pattern," and that there is no support in either for their application to "enterprise." Finally, it completes the *tour de force* by reading "continuity," in its application to "enterprise," to include an open-endedness requirement that it admits, by its holding in this case, is precluded by the statute even in regard to "pattern." This is judicial interpretation run amok; it so far transcends the permissible construction of the statute that a summary reversal of this case is warranted under Rule 23.1 of this Court.

**Third, Fourth and Tenth Circuits**

The rules of the Second and Fifth Circuits, which erroneously conflate "enterprise" with the racketeering activity that is the operational object of RICO, may perhaps be viewed as anomalies. But the question of whether a single-purpose scheme must be open-ended to constitute a *"pattern"* has recently been considered by the Third, Fourth, and Tenth Circuits, with totally irreconcilable results.

In *Barticheck v. Fidelity Union Bank/First National State,* 56 U.S.L.W. 2260 (November 10, 1987), No. 86-5870, slip op. (3rd Cir. October 29, 1987), (to be reported at 832 F. 2d 36; text of opinion reproduced as Appendix P), the Third Circuit rejected an open-endedness requirement for a single-purpose scheme. The Court stated (56 U.S.L.W. at 2260, slip op. at 8-9; Appendix P at 162A):

> "We also reject the view that racketeering acts committed pursuant to a single

> scheme can constitute a RICO pattern only if the scheme is potentially ongoing or open-ended. This requirement is ostensibly derived from the statement in RICO's legislative history, highlighted in *Sedima*, that a pattern must display "continuity" among the various acts of racketeering. *See Sedima*, 473 U.S. at 496 n. 14 (quoting S. Rep. No. 617, 91st. Cong., 1st Sess. 158 (1969)). We do not believe, however, that the notion of continuity compels a requirement of "open-endedness." At the very least, such a requirement would produce anomalous results. This approach would allow a party to maintain a RICO claim if he brought suit before the unlawful scheme had attained its objective; in such a case the scheme would presumably be considered open-ended. The same interpretation, though, would deny a RICO cause of action in a case where the scheme had fully accomplished its goal. Yet it is the completed scheme that inflicts the greater harm and more strongly implicates the remedial purposes of RICO.
>
> We read the legislative history's references to "continuity" as simply calling for an inquiry into the extent of the racketeering activity. Although temporal open-endedness may be one measure of extent, it is not the only one ...."

The opposite conclusion was reached in *Eastern Publishing and Advertising, Inc. v. Chesapeake Publishing and Advertising, Inc.*, No. 87-1520, slip op. (4th Cir. October 16, 1987) (to be reported at 831 F. 2d 488; text of opinion reproduced as Appendix O); and in *Garbade v. Great Divide*

*Mining & Milling Corp.*, No. 86-2544, slip op. (10th Cir. October 15, 1987) (to be reported at 831 F. 2d 212; text of opinion reproduced as Appendix N).

In each of these cases the Circuit Court affirmed the dismissal of RICO claims on the ground that they involved single-purpose schemes that had terminated at the inception of the actions. The decision in each case was predicated upon the Court's perception of the meaning of footnote 14 of *Sedima*.

In neither opinion did the Court deal with the question of whether its holding had implicitly read §1962(b) out of the statute; or, if §1962(b) continued to exist, whether the Court was violating §1961(5) by applying different standards for "pattern" to the various subsections of §1962.

In each of these cases the plaintiff would have prevailed, on the authority of *Barticheck*, if the action had been brought in the Third Circuit.

## CONCLUSION

"Pattern" litigation in the Federal Courts is in a state of chaos. The outcome of any particular case is completely dependent on the Circuit in which it happens to have been brought. The "pattern" rules of each Circuit are in direct conflict with those of other Circuits. The provisions of the statute are being widely violated, and footnote 14 egregiously misinterpreted.

The worst offenders are the Second and Fifth Circuits, which have taken a giant step beyond any of the others by erroneously applying "pattern" considerations to the term "enterprise."

For the foregoing reasons, and those set forth in previous submissions, it is imperative that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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## APPENDIX N

## OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT IN *GARBADE V. GREAT DIVIDE MINING AND MILLING CORPORATION*, NO. 86-2544, SLIP OP. (10TH CIR. OCTOBER 15, 1987) (TO BE REPORTED AT 831 F. 2D 212)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 86-2544

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ALBERT M. GARBADE, JR., on behalf of himself and all other stockholders of Great Divide Mining and Milling Corporation,

*Plaintiff-Appellant,*

v.

GREAT DIVIDE MINING AND MILLING CORPORATION, a Colorado corporation, and MILTON M. LEVIN,

*Defendants-Appellees.*

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Appeal From the United States District Court For The District of Colorado (D.C. Civil No. 85-K-2191)

G. Robert Blakey of McGuire, Cornwell & Blakey, P.C. (F. Kelly Smith, with him on the brief), Denver, Colorado, for Plaintiff-Appellant.

John R. Henderson of Vranesh and Raisch, Boulder,

Colorado, for Defendants-Appellees.

Before: SEYMOUR, SETH and BALDOCK,
*Circuit Judges*

SETH, *Circuit Judge:*

The defendant Great Divide Mining and Milling Corporation, a Colorado corporation, held several mining claims. It was organized by plaintiff's father who loaned it money from time to time. The defendant Levin later became the majority stockholder and he also loaned money to Great Divide beginning in the 1960s. He may have accepted shares of stock as payment for some of his loans. In 1976 Great Divide leased mining claims to Noranda Exploration for annual payments. This was apparently the first source of income for Great Divide for a long time. Mr. Garbade, Sr. and defendant Levin, then the Vice President, both wanted this to be applied in payment of their loans made to the company. Shortly thereafter, Mr. Garbade, Sr. died leaving Mr. Levin as the principal officer, majority stockholder and a director.

Thereafter as the lease payments were received by the company, Levin would apply the funds to repay his loans and intended to continue until he was repaid in full with interest. He later negotiated an additional lease of corporate claims with a Mr. Baumgartner which generated more income to Great Divide, which he then applied to the same purpose.

The applications of corporate funds were made secretly and without the knowledge or concurrence of other stockholders. It is this secret withdrawal of corporate income which the plaintiff asserts was illegal and constituted the fraud upon which the RICO and pendent state fraud claims were based.

The trial court dismissed the corporate defendant, Great Divide, entered summary judgment for defendant Levin, and dismissed the state claims. The court concluded that there was asserted nothing to constitute a "pattern of racketeering activity" by defendant Levin, 18 U.S.C. §1961(5); that there was no §1962(a) violation arising from the withdrawal of funds from the corporation; and that under §1962(c) and §1962(a) in these circumstances the corporation would not be both an "enterprise" and a "person." The plaintiff has appealed.

The appellant alleged that the acts of defendant Levin violated 18 U.S.C. §1962(a). This section is concerned with the use of funds derived from a "pattern of racketeering activity" to acquire interests in, or invest in, or to operate legitimate enterprises. The complaint was directed to asserted fraudulent withdrawal of funds from the corporation and not to investments in the concern. There were no facts to support an assertion that the funds loaned to the corporation were from a source described in §1962(a) nor used for the prohibited purposes.

The complaint further alleges that the corporate defendant, Great Divide, violated 18 U.S.C. §1962(c). The trial court dismissed the corporation on the ground that it could not in these circumstances be both an "enterprise" and a "person" within the purposes and wording of the section. We must agree. Section 1962(c) makes it unlawful for a "person" to enter the activities of an "enterprise" using racketeering activities. References are to "employed by" and "associated with." The section does not relate to corporate or enterprise liability. *Schofield v. First Commodity Corp.*, 793 F. 2d 28 (1st Cir.); *Haroco, Inc. v. Amer. Nat'l Bank & Trust Co.*, 747 F. 2d 384 (7th Cir.); *United States v. Computer Sciences Corp.*, 689 F. 2d 1181 (4th Cir.).

There is no indication whatever that the corporation was in any way benefited by the alleged acts of any defendant. The existence of such benefits have provided, in several cases, an exception to this conclusion and to impose corporate liability under §1962(a).

As the the claim of corporate liability under §1962(a), the trial court dismissed the corporate defendant. Again we agree. The "person" and "enterprise" combination liability can only occur when the corporation actually is the direct beneficiary of the pattern of racketeering activity, *Haroco, Inc. v. Amer. Nat'l Bank & Trust Co.*, 747 F. 2d 384 (7th Cir.); also, where it is to disgorge illegally obtained proceeds, *Masi v. Ford City Bank & Trust Co.*, 779 F. 2d 397 (7th Cir.); or where the statute seeks to reach the proceeds of illegal activities, *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F. 2d 1393 (9th Cir.).

In the case before us the defendant corporation received no illegally obtained funds as contemplated by the statute. Its dismissal by the trial court was proper.

This brings us to the §1962(c) claim against the defendant Levin and more particularly to the issue of whether there was shown to be "a pattern of racketeering activity." In our view, when *Torwest DBC, Inc. v. Dick*, 810 F. 2d 925 (10th Cir.), is applied to these facts and circumstances the conclusion must be reached that the statutory requirements for such a §1962(c) claim were not met.

*Torwest* decided what was not a pattern of racketeering activity, as did *Condict v. Condict*, 815 F. 2d 579 (10th Cir.). We will do the same and again not attempt to construct an affirmative definition of what would constitute such a pattern. Thus as was said in *Torwest:*

"In reaching this conclusion, we decline to

> go beyond the facts before us to formulate a bright-line test in the abstract."

As the description of the facts recited, the defendant Levin made the several secret withdrawals in an attempt to have the loans he had made to the company repaid out of company funds which he could control as a first priority. This method of securing repayment was to continue until the loan, with interest, had been repaid and nothing more. Thus there existed a clear and definite single objective for his acts.

This would seem to fit well into the holding in *Torwest* as to the scheme there concerned:

> "[T]o achieve a single discrete objective does not in and of itself create a threat of ongoing activity, even when that goal is pursued by multiple illegal acts, because the scheme ends when the purpose is accomplished."

The Court in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, referred to the purpose of the statute as one to meet "the threat of continuing activity" and not "sporadic activity." The elements required are described in *Torwest* and in its analysis of *Sedima*. In *Torwest* and here there is nothing from which there could be inferred a continuing scheme. The continuity element is absent here.

We have examined the arguments of appellant in regard to the Baumgartner lease on a portion of the corporate property which was negotiated and signed by the defendant Levin. He was then apparently the only corporate officer. We cannot conclude that this lease, nor the circumstances surrounding it, add any additional elements to the case relative to the issues raised and need

no separate discussion.

We thus agree with the action of the trial court in granting summary judgment for the defendant Levin and in the dismissal of the corporate defendant.

The judgment of the trial court is AFFIRMED.

## APPENDIX O

## OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN *EASTERN PUBLISHING AND ADVERTISING, INC., V. CHESAPEAKE PUBLISHING AND ADVERTISING, INC.*, NO. 87-1520, SLIP OP. (4TH CIR. OCTOBER 16, 1987) (TO BE REPORTED AT 831 F. 2D 488)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-1520

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EASTERN PUBLISHING AND ADVERTISING, INC., (A Close Corporation), t/a "ARMED FORCES NEWS",
*Plaintiff-Appellant,*

versus

CHESAPEAKE PUBLISHING AND ADVERTISING, INC., (A Close Corporation), t/a "THE MILITARY NEWS"; KAREN A. HORN, KIMBERLY J. HORN; CAROL WHITNEY ANSELL, DELLA LEMMINGS; ALFRED E. CLASING, III; RAYMOND J. CANNOLES; LOUISE MARTINS,
*Defendant-Appellees.*

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Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (CA-86-1653-JFM)

Argued: June 29, 1987. Decided: October 16, 1987

Before: PHILLIPS, ERVIN, and WILKINSON, *Circuit Judges*

William Edward Seekford for Appellant; John Joseph Kuchno (Henry R. Lord; Piper & Marbury; Charles Martinez; Eccleston & Seidler on brief) for Appellees.

PHILLIPS, *Circuit Judge:*

Appellant Eastern Publishing and Advertising, Inc. (Eastern), appeals the Rule 12(b)(6) dismissal of its claims against a competing publisher, Chesapeake Publishing and Advertising, Inc. (Chesapeake), former Eastern employees, and former associates in the law firm that represents Eastern, alleging copyright infringement and RICO and antitrust violations. We affirm the dismissal of the copyright claim because Eastern failed to attach the requisite notice to the advertisements and to the issues of its newspaper, "Armed Forces News," on which it claims copyrights. We also affirm dismissal of the civil RICO and antitrust claims on the grounds relied upon by the district court.

I

Eastern publishes a quarterly newspaper, "Armed Forces News," which is directed to military personnel and their dependents and which consists of original advertising and publicly available government press releases. Chesapeake publishes a competing paper, "The Military News." Claiming that its publication is entitled to copyright protection as a "compilation" under 17 U.S.C. §§101, 103, even though the government publications that make up the newspaper are not themselves copyrightable, 17 U.S.C. §101, Eastern claimed that

Chesapeake infringed its copyrights in two issues of the "Armed Forces News," Volume V, Number III and Volume VI, Number IV. Eastern also claimed that Chesapeake infringed valid copyrights in individual advertisements appearing in those same issues. Volume V, Number III first was published on March 22, 1986, and Volume VI, Number IV on March 27, 1986. Eastern registered copyrights in these materials on May 9 and May 20, 1986, respectively. Copyright notices appeared on subsequent issues of the publication. No copyright notices appeared on the advertisements.

Appellees Karen Horn, Kimberly Horn, Carol Ansell, and Della Lemmings were employees of Eastern until April 1986. Appellees Alfred Clasing and Raymond Cannoles, worked with the law firm retained by Eastern before formation of Chesapeake; appellee Louise Martins currently works with Clasing and Cannoles. Clasing, Cannoles, and Martin are Chesapeake directors, and Karen Horn is the company's registered agent. According to Eastern's complaint, the various named defendants were responsible for photocopying, cutting apart, and reassembling Volume V, Number III and Volume VI, Number IV of "Armed Forces News" to create and publish "The Military News." Eastern further alleged that unidentified defendants represented to Eastern's advertising customers that Chesapeake was connected to Eastern and that the customers could renew their advertisements in Eastern's publication through Chesapeake. These customer contacts were alleged to have taken place through the mails and by interstate wire and telephone transmissions on various occasions during March, April, and May 1986.

In addition to claiming that publication of "The Military News" infringed Eastern's copyrights, Eastern charged that Chesapeake's exploitation of its customers

led to a decline in the number of "Armed Forces News" customers, while the number of Chesapeake's customers increased to the point that Chesapeake now controls the relevant market. Thus, according to Eastern, Chesapeake's activities have injured competition in violation of federal antitrust laws, 15 U.S.C. §§1-15. Eastern did not allege before the district court that any other competitor beside itself had been injured, but on appeal Eastern submits that at least three other competitors exist and that at least one of these has been injured competitively. Finally, Eastern charged Chesapeake with civil RICO violations for having committed multiple acts of mail and wire fraud in misleading Eastern's customers into publishing advertisements in "The Military News."

In ruling on appellees' 12(b)(6) motion, the district court found: (1) there was no copyright infringement because defendant's publication amounted to a recompilation of the copyrighted issues of "Armed Forces News"; (2) there was no "pattern" of racketeering activity to support the RICO claim; and (3) the facts alleged did not demonstrate the injury to competition required for an antitrust claim.

This appeal followed.

II

Eastern claims copyright in two separate sets of material: (1) advertisements published in "Armed Forces News"; and (2) two particular issues of the newspaper, Volume V, Number III and Volume VI, Number IV. To succeed on a copyright claim, one asserting copyright protection must have registered the copyright, 17 U.S.C. §411(A); *Conan Properties, Inc. v. Mattel, Inc.*, 601 F. Supp. 1179, 1182 (S.D.N.Y. 1984); *International Trade Management, Inc. v. United States*, 553 F. Supp. 402 (Ct. Cl. 1982),

and must also have attached notice of copyright on all publicly distributed copies of the protected item. 17 U.S.C. §401(a); *e.g., M. Kramer Manufacturing Co. v. Andrews*, 783 F. 2d 421, 443 (4th Cir. 1986).

No notice appeared on the individual advertisements. 17 U.S.C. §404(a) permits a copyright notice on a compilation of work as a whole to cover individual parts of the whole, unless the individual part is an advertisement for the benefit of someone other than the holder of the copyright in the entire collective work. A newspaper claiming copyright ownership in an advertisement prepared for another must give specific and separate notice of its copyright in the advertisement. *See Canfield v. Ponchotoula Times*, 759 F. 2d 493 (5th Cir. 1985). Therefore, even if notice of copyright was affixed properly to the newspaper to cover the publication as a whole, that notice would not cover the individual advertisements, and there can be no copyright infringement as to them.

There also was no notice on the two issues of "Armed Forces News" for which copyrights were registered on May 9 and May 20, 1986. Assuming these issues were copyrightable as "compilations," which are selections or arrangements of even uncopyrightable material in an original way, *see Southern Bell Telephone and Telegraph Co. v. Associated Telephone Directory Publishers*, 756 F. 2d 801, 809 (11th Cir. 1985), the registered copyrights lend no protection to Eastern unless the failure to place notice upon them is excused under 17 U.S.C. §405(a). Section 405(a)(2) excuses omission of notice if

> registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the

> public in the United States after the omission has been discovered.

Eastern, having registered copyrights in the March 22 and March 27 issues on May 9 and May 20, and having placed general copyright notices on subsequent issues of the "Armed Forces News," claims that its copyright is preserved by the §405(a)(2) excuse.

The district court declined, in dictum, to excuse the failure to give notice under §405(a)(2) because it believed this section of the Copyright Act "is most clearly applicable to products identical to one another which are in continuous production," citing *Original Appalachian Artworks, Inc. v. Toy Loft*, 684 F. 2d 821, 826-27 (11th Cir. 1982) (dolls); *Shapiro & Son Bedspread Corp. v. Royal Mills Associates*, 568 F. Supp. 972, 976-77 (S.D.N.Y. 1983) (bedspreads); *Beacon Looms, Inc. v. S. Lichtenberg & Co.*, 552 F. Supp. 1305 (S.D.N.Y. 1982) (curtains); *but cf. Canfield*, 759 F. 2d 493 (considering the §405(a)(2) exception in a case involving newspapers). Our research reveals only one case in which §405(a)(2) has been invoked to preserve copyright protection for an article that is not in constant production, *Werlin v. The Reader's Digest Association*, 528 F. Supp. 451, 461 (S.D.N.Y. 1981), and we decline to follow its lead on the facts of this case. We therefore agree with the district court that §405(a)(2) does not apply unless there is continuous production of identical products, and for reasons that follow, we think that was not shown here.

Here, Eastern has claimed a copyright in two specific issues of its publication, each of which necessarily had not only a limited period of distribution but also a very limited lifespan in the hands of a consumer. Subsequent notice placed upon later, different issues of "Armed Forces News" is ineffective to alert others that copyrights cover earlier issues. It is also impossible for Eastern to

attach notice to the issues in question and thereby to comply literally with the second prong of §405(a)(2).

Cases considering the related question whether one claiming protection under §405(a)(2) must place notices of copyright on products already distributed to customers or only on products still in the hands of a retail seller support this conclusion. *See, e.g., M. Kramer*, 783 F. 2d at 444; *Donald Frederick Evans and Associates, Inc. v. Continental Homes*, 785 F. 2d 897, 911 n. 22 (11th Cir. 1986). Whatever their particular conclusions, these cases, like those construing the "reasonable effort" required by §405(a)(2) must have continued distribution, at least from a retailer, as well as continued use in the hands of a consumer or retailer. That simply is not the case with respect to the discrete issues of newspapers for which protection is sought here. These products obviously do not have those essential aspects.

Because the savings provision of §405(a)(2) does not apply here, Eastern's failure to give notice is not excused, and the two publications of "Armed Forces News" do not merit copyright protection.

III

We also agree with the district court's dismissal of Eastern's civil RICO claim. The essential elements of this type of RICO claim are: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). The racketeering activities upon which Eastern's claim is based are mail and wire fraud allegedly committed when appellees solicited appellant's advertising customers, misrepresenting that they were working on behalf of the "Armed Forces News." The district court found that these instances of mail and wire fraud did not establish the

requisite "pattern" for a successful RICO claim.

We think decision here is controlled by our interpretation and application of the "pattern" requirement in *International Data Bank, Ltd. v. Zepkin*, 812 F. 2d 149 (4th Cir. 1987). In that case, drawing on the Supreme Court's recognition in *Sedima*, 473 U.S. 479, that more careful adherence by the courts to this requirement might properly limit civil RICO claims to their proper scope, we concluded that "no mechanical test can determine the existence of a RICO pattern," and that the question is necessarily a "matter of criminal dimension and degree" to be decided on a case-by-case basis. *Zepkin*, 812 F. 2d at 155. The touchstone for assessing this we thought was revealed by the legislative history's emphasis that what was targeted was "not sporadic activity" but continuity or the threat of continuity of racketeering activity. *Id.* at 154. On this basis, we concluded that as a general proposition "a single, limited fraudulent scheme," notwithstanding it might include the requisite minimal number of sufficiently related predicate acts would not constitute the "pattern" of racketeering activity contemplated by Congress. *Id.* Such a single, limited scheme we thought was not the kind of "ongoing unlawful activities whose scope and persistence pose a special threat to social well-being." *Id.* While we recognized that a scheme properly considered to be a "single" one might by virtue of its very size and continuity meet the test, we thought the typical fraudulent schemes, limited in occurrence, in scope, and in purpose, that have been the traditional subjects of state tort law were not intended to be swept into RICO's reach by Congress. *Id.*

On this basis we concluded that a RICO complaint by investors alleging as predicate acts two violations of the securities laws in connection with the sale of securities did not sufficiently allege a pattern of RICO activity. We

held that the conduct charged was instead merely that of a "single, limited scheme" to defraud. Though it met the technical requirements of predicate acts sufficiently related to each other, it failed to charge the kind and degree of continuous engagement in criminal conduct required to constitute a RICO "pattern."

We think exactly the same analysis applies to the conduct charged here. The predicate mail and wire fraud acts charged are sufficient in number. They are sufficiently related in allegedly furthering Chesapeake's efforts to gain a competitive edge over Eastern. But in the end all that results is a single, non-recurring scheme to defraud a single entity by taking unfair competitive advantage in a quite narrow business context. There is no inference that the scheme embodies a threat of continued like activity in the future. Just as the scheme alleged in *Zepkin* was found wanting in the required degree of continuity of conduct, so is that here. The complaint fails to allege a RICO pattern of racketeering activity. *See Medallion TV Enterprises v. SELECTV of California, Inc.*, 627 F. Supp. 1290, 1296-97 (C.D. Cal. 1986) (series of calls and letters over a two-month period constitutes a single criminal episode, not a "pattern of activity"); *Phelps v. Wichita Eagle-Beacon*, 632 F. Supp. 1164, 1171-72 (D. Kan. 1986) (several telephone conversations and mailings in furtherance of a single ongoing scheme to harm plaintiff not a RICO "pattern"); *Grant v. Union Bank*, 629 F. Supp. 570, 578 (D. Utah 1986) (multiple mail and wire conviction in furtherance of single fraudulent loan scheme not a RICO pattern); *cf. Temporaries, Inc. v. Maryland National Bank*, 638 F. Supp. 118 (D. Md. 1986) (recognizing that single open-ended scheme might be so extensive in potential scope as to constitute pattern); *see also HMK Corp. v. Walsey*, ___ F. 2d ___, No. 86-3582 (4th Cir. Sept. 17, 1987) (applying *Zepkin* to find no pattern in single scheme extending over long period and involving many

predicate acts aimed at corrupting political processes to gain competitive advantage).

IV

Eastern's antitrust claim is based upon the defendants' acts of copyright infringement and appropriation of confidential business information. The district court held this not to be the type of conduct at which the antitrust laws are aimed, and we agree. *See Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F. 2d 1272, 1283 (7th Cir. 1983). Moreover, the antitrust laws are inapposite here because the only damage is to Eastern as a competitor; there is no alleged injury to competition in the relevant market. *See id.*, at 1284-85; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) Eastern complains on appeal that in finding no injury to competition, the district court erroneously believed that there were no competitors in the market other than Eastern and Chesapeake. The court noted that before the creation of Chesapeake, there was only one market entity, Eastern, and that if events transpire as Eastern predicts, there will only be one market entity, Chesapeake. Therefore, there was no injury to competition. Eastern now avers for the first time that there are other competitors who are also harmed by Chesapeake's activities. We decline to take into account these other alleged competitors because their existence and injury were not averred in the complaint nor in any way suggested to the district court.

AFFIRMED.

## APPENDIX P

## DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN *BARTICHECK V. FIDELITY UNION BANK/FIRST NATIONAL STATE*, NO. 86-5870, SLIP OP. (3D CIR. OCTOBER 29, 1987), 56 U.S.L.W. 2260 (NOVEMBER 10, 1987) (TO BE REPORTED AT 832 F. 2D 36)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5870

---

JOHN E. BARTICHECK, DAVID CARMEL, EMPIRE EMBLEM CO., MELVIN GITTLEMAN, MARK GORDON, ELLIE GORDON, DANTE GRECO, WALTER HIRSCHINGER, THEODORE KAHN, MURIEL KAHN, STANLEY LOW, PETER MARTIN, ELISSA MARTIN, DIANE C. NATOLI, HOBART RAUCH, HOWARD M. SHIFFMAN, ROBERT R. SCHWARTZ, JOHN J. VAS, GARY WOLKOWITZ, SARAH WOLKOWITZ, AL ATTERMAN, ABRAHAM SCHLUSSEL, and MORTON GOETZ,

*Appellants,*

v.

FIDELITY UNION BANK/FIRST NATIONAL STATE, a national banking association, GARY FLAKER, and KEVIN SHANLEY,

*Appellees,*

and

JAMES D. DEMETRAKIS, STEPHEN P. SINISI,
and DEMETRAKIS, SINISI & CARMEL, ESQS.,
*Additional Defendants*
*on Counterclaim.*

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Appeal from the United States
District Court for the
District of New Jersey
(D.C. Civil No. 86-201)

Argued August 3, 1987
Before: SEITZ, MANSMANN, and
GREENBERG, *Circuit Judges*
(Opinion Filed October 29, 1987)

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*Attorneys for Appellees*

## OPINION OF THE COURT

SEITZ, *Circuit Judge.*

The plaintiffs in this action appeal a district court order dismissing their complaint for failure to state a claim upon which relief may be granted. This court has jurisdiction under 28 U.S.C. §1291 (1982).

I.

Plaintiffs are twenty-three investors in a failed limited partnership. Defendant Fidelity Union Bank/First National State is the successor to Garden State National Bank, the institution involved in the events at issue here (both Fidelity Union Bank/First National State and Garden State National Bank will be referred to as "the Bank"). Defendant Gary Flaker was at all relevant times a vice president and loan officer of the Bank. Defendant Kevin Shanley was vice chairman of the Bank.

For present purposes, we must assume that the facts set forth in the complaint are true. *Wisniewski v. Johns-Manville Corp.*, 759 F. 2d 271, 273 (3d Cir. 1985). These facts are as follows. In 1980 various individuals and entities organized the Continental Energy Associates IV limited partnership (Continental) to engage in oil and gas drilling. Plaintiffs allege that some or all of these organizers had preexisting debts to the Bank and could obtain the funds to repay these obligations only by selling interests in Continental to outside investors. Certain Continental organizers arranged with Shanley for the Bank to loan

money to persons who wished to invest in Continental. Shanley authorized the organizers to advise prospective investors of the terms on which the Bank would lend funds for investment in Continental and to solicit and process loan applications. In some instances, the Bank authorized the organizers to transmit loan documents from the Bank to investors and from investors to the Bank. Shanley directed Flaker to process loan applications from prospective investors in Continental.

The Continental organizers approached each of the plaintiffs to induce them to purchase limited partnership interests in Continental. To this end, the organizers made several material misrepresentations. They told the plaintiffs that the bank was financing Continental's oil and gas drilling program. They also stated that the Bank had examined the geological data concerning the proposed drilling program and had concluded that the program was a completely safe investment. The organizers further represented that the Bank would lend the entire purchase price of each investor's limited partnership interest, regardless of the investor's ability to repay the loan from his own funds, because the Bank was satisfied that the investors would be able to repay the purchase price in two to three years out of the profits realized and distributed by Continental. The complaint alleges that, in approaching plaintiffs and making these misrepresentations, the organizers acted as agents of the Bank.

The plaintiffs borrowed a total of $2,310,000 from the Bank, in amounts ranging from $60,000 to $300,000. Most of the plaintiffs borrowed an amount equal to all or substantially all of the purchase price of their interests in Continental. The Bank granted the loans to plaintiffs without following its normal procedures for verifying the creditworthiness of loan applicants. This departure from standard practice was intended to assure the plaintiffs of

the soundness of the venture. At the time it made the loans, the Bank knew or should have known of the organizers' misrepresentations to the plaintiffs. Flaker assured several of the plaintiffs that the organizers' representations were true, when he knew or should have known that the statements were false.

The interests in Continental proved to be worthless. The plaintiffs subsequently commenced this action for damages against the Bank, Shanley, and Flaker. The complaint alleges violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§1961-1968 (1982 & Supp. III 1985), and various pendent claims under state law. The RICO count alleges, *inter alia*, that in furtherance of a scheme to defraud the plaintiffs, the defendants used, and caused the plaintiffs to use, the United States mails on two or more occasions, in violation of the federal mail fraud statute, 18 U.S.C. §1341 (1982). Mail fraud falls within RICO's definition of "racketeering activity." 18 U.S.C. §1961(1) (Supp. III 1985).

The district court granted the defendants' motion to dismiss the RICO claim. The court held that the acts of mail fraud alleged in the complaint did not amount to a "pattern" of racketeering activity, an essential element of a RICO claim, *see* 18 U.S.C. §§1961(5), 1962 (1982). The court employed a two-pronged definition of "pattern." Under this definition, racketeering activity constitutes a pattern only if it is in furtherance of (1) two or more unlawful schemes, or (2) a single, open-ended, ongoing scheme. The court found that the complaint alleged only a single scheme, a plan fraudulently to obtain loan applications from investors in Continental. The court also determined that the alleged scheme was not open-ended because it had fully attained its objective and posed no threat of further unlawful activity.

Having held that the plaintiffs failed to state a claim under RICO, the district court dismissed the remainder of the complaint for lack of subject-matter jurisdiction. This appeal followed.

II.

The sole question before us is whether the district court erred in holding that the plaintiffs' complaint failed to allege a "pattern of racketeering activity" as that term is used in RICO. Our review is plenary.

The RICO statute states that a "'pattern of racketeering activity' requires at least two acts of racketeering activity." 18 U.S.C. §1961(5) (1982). In *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), the Supreme Court observed in dictum that although two acts of racketeering are necessary to form a pattern, they may not be sufficient. *Id.* at 496 n. 14. The Court continued:

> The legislative history supports the view that two isolated acts of racketeering do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969) (emphasis added).

*Id.*; *accord id.* at 527-28 (Powell, J., dissenting). The *Sedima* dictum has been widely viewed as a signal to the federal courts to fashion a limiting construction of RICO around the pattern requirement and the concepts of "continuity" and "relationship." The position of the district court in

this case that a pattern requires either two distinct schemes or a single ongoing scheme represents an attempt to constrain the reach of the statute along the lines suggested by *Sedima*.

In previous RICO cases this court has not had occasion to define the precise contours of the pattern requirement. *See Town of Kearny v. Hudson Meadows Urban Renewal Corp.*, No. 87-5044, slip op. at 11-12 (3d Cir. Sept. 25, 1987); *Petro-Tech, Inc. v. Western Co. of N. Am.*, 824 F. 2d 1349, 1354-55 (3d Cir. 1987); *United States v. Grayson*, 795 F. 2d 278, 289-90 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 927 (1987); *Malley-Duff & Assocs. v. Crown Life Ins. Co.*, 792 F. 2d 341, 353 n. 20 (3d Cir. 1986), *aff'd*, 107 S. Ct. 2759 (1987). In those cases we assumed, without deciding, that a pattern requires not only two acts of racketeering but also two distinct unlawful schemes. In each instance, we concluded that the facts before us satisfied even this stringent standard. Those cases, however, also recognized that the existence of a RICO pattern does not turn on the abstract characterization of racketeering acts as "continuous" and "related" but rather on a combination of specific factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity. *See Petro-Tech*, 824 F. 2d at 1355 (cases refusing to find a RICO pattern are "distinguishable from this case on the basis of the time period, number of victims, number of perpetrators and number of predicate acts at issue"); *see also Town of Kearny*, slip op. at 11; *Grayson*, 795 F. 2d at 290.

The complaint in this case arguably depicts an unlawful venture more modest than those involved in our earlier cases. *Cf. Town of Kearny*, slip op. at 12 (two separate schemes to bribe city officials); *Petro-Tech*, 824 F. 2d at 1355 (fraud involving services for eighty oil wells

performed pursuant to two contracts covering different time periods); *Grayson*, 795 F. 2d at 290 (seven racketeering acts, performed over a period of more than a year, involving manufacture, distribution, and sale of methamphetamine and phencyclidine); *Malley-Duff*, 792 F. 2d at 353 n. 20 (fraudulent termination of insurance agencies in several cities). Indeed, the plaintiffs concede that they have alleged only a single unlawful scheme.

Nevertheless, we believe the district court erred in concluding that the plaintiffs failed to allege a RICO pattern. Although the complaint states only that the defendants committed "two or more" acts of mail fraud in furtherance of their alleged scheme, it may fairly be inferred from the nature of the scheme that defendants engaged in considerably more than two such acts. The scheme was carried out by several individuals and two separate entities, Continental and the Bank. Most significantly, the scheme involved the repetition of similar misrepresentations to more than twenty investors. To refer to such conduct as a "pattern" of fraudulent activity certainly comports with the ordinary understanding of the term, and we believe that this conduct properly falls within the reach of the RICO statute.

In holding that the complaint alleges a pattern of racketeering activity, we reject the position that a RICO pattern must involve at least two distinct unlawful schemes. *See, e.g., Superior Oil Co. v. Fulmer*, 785 F. 2d 252 (8th Cir. 1986). We note two difficulties with this view. First, "scheme" is hardly a self-defining term, and it appears nowhere in the RICO statute. We prefer to confront the inevitable definitional problems in this context by interpreting the "pattern" language directly, rather than by introducing a new and perhaps more amorphous concept into the analysis. Second, even assuming one could adequately distinguish among multiple schemes, a

rule requiring two or more schemes would exempt from RICO liability defendants who engage in only a single unlawful scheme, however extensive and injurious. Such an outcome is plainly inconsistent with the purposes of the statute.

We also reject the view that racketeering acts committed pursuant to a single scheme can constitute a RICO pattern only if the scheme is potentially ongoing or open-ended. This requirement is ostensibly derived from the statement in RICO's legislative history, highlighted in *Sedima*, that a pattern must display "continuity" among the various acts of racketeering. *See Sedima*, 473 U.S. at 496 n. 14 (quoting S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969)). We do not believe, however, that the notion of continuity compels a requirement of "open-endedness." At the very least, such a requirement would produce anomalous results. This approach would allow a party to maintain a RICO claim if he brought suit before the unlawful scheme had attained its objective; in such a case the scheme would presumably be considered open-ended. This same interpretation, though, would deny a RICO cause of action in a case where the scheme had fully accomplished its goal. Yet it is the completed scheme that inflicts the greater harm and more strongly implicates the remedial purposes of RICO.

We read the legislative history's references to "continuity" as simply calling for an inquiry into the extent of the racketeering activity. Although temporal open-endedness may be one measure of extent, it is not the only one. We decline to adopt a verbal formula for determining when unlawful activity is sufficiently extensive to be "continuous." This determination necessarily depends on the circumstances of the particular case.

Finally, we fully appreciate the concern over civil

RICO's increasing use in attempts to reach "garden variety" business fraud and the potential utility of the pattern requirement as a means of curtailing this trend. The desire to limit the range of the statute, however, must be tempered by the insight that in some instances business-related fraud can constitute a pattern of racketeering activity under RICO. On the basis of the allegations contained in the complaint, we believe this is such an instance.

IV.

We will reverse the judgment of the district court dismissing plaintiffs' RICO claim and remand for proceedings consistent with this opinion. Because we hold that the district court erred in dismissing this federal claim, we also hold that the court erred in dismissing plaintiffs' pendent state claims for lack of subject-matter jurisdiction. Accordingly, we will order that plaintiffs' pendent claims be reinstated.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

## APPENDIX Q

## OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK IN *KRANTZ V. SCHLESINGER*, NO. CV-86-1637, SLIP OP. (E.D.N.Y., NOVEMBER 16, 1987)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-86-1637

MEMORANDUM AND ORDER

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LARRY KRANTZ, ET AL.,
*Plaintiffs,*

-against-

RICHARD SCHLESINGER, ET AL.,
*Defendants.*

---

APPEARANCES:

Larry H. Krantz
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By: Larry H. Krantz, Esq.
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By: Ronald E. DePetris, Esq.
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WEINSTEIN, *Ch. J.*:

Plaintiffs, subscribers to an agreement to buy apartment units in the Mendocino Green Complex, brought suit against the sponsor of the offering plan to convert the complex to a condominium development. They allege violation of 18 U.S.C. §§1961-68 (RICO) predicated upon alleged commission of mail fraud incident to two schemes by defendants to abandon the plan. Fraud and breach of contract under state law are also alleged. The schemes to defraud were allegedly directed against plaintiffs and the New York State Attorney General.

Defendants made a motion to dismiss, and plaintiffs were given leave to amend the complaint. In March of this year, defendants' motion to dismiss the amended complaint was denied. Also denied was defendants' application for certification of an order allowing an interlocutory appeal.

Defendants now renew their motion to dismiss the amended complaint. Fed. R. Civ. P. 12(b), (h). For reasons stated below, plaintiffs' federal claim must be dismissed for failure to adequately plead the continuing criminal enterprise requirement of RICO, 18 U.S.C. §§1961(4), 1962, and for lack of subject matter jurisdiction.

## I. FACTS

Plaintiffs' civil RICO claim arises from an agreement with defendants Richard Schlesinger, doing business as Wags Realty, a sole proprietorship; Quest-Co. Ltd., a corporation and licensed real estate broker; and Baldwin Townhouse Company, a general partnership including

Richard Schlesinger. Defendants are referred to collectively as the "sponsor" of the offering plan.

In March, 1985, plaintiffs executed an agreement with defendants to buy an apartment in the Mendocino Green Complex, which was then owned by Baldwin Townhouse. Quest-Co. Ltd. was the selling agent for the units. The purchase agreement contained the terms of the condominium offering plan. It provided for certain situations under which the plan could be abandoned, including the "...existence of a defect in title which cannot be cured except by litigation or otherwise at a cost to the sponsor of less than $50,000...".

Later that month, the sponsor filed an amendment to the plan, declaring it effective. After having difficulty obtaining approval from the Nassau County Planning Commission for the subdivision of the complex into separate tax units, the sponsor submitted a form to the New York State Attorney General's office abandoning the plan. The stated reason for abandonment was the cost of compliance with subdivision requirements of the Nassau County Planning Commission.

In March, 1986, the Attorney General rescinded the sponsor's attempted abandonment, finding that the sponsor had failed to substantiate the basis for abandonment. Subsequent to the filing of the amended complaint in this action, the Attorney General conducted a more thorough investigation, finding that defendants' conduct constituted a fraud on the purchasers and the Attorney General.

The majority of aggrieved purchasers have settled with defendants, allowing the sponsor to convert the complex into a cooperative. *Annunziata v. Schlesinger*, No. 86-3511 (Sup. Ct., Nassau Cty., Sept. 16, 1986). Plaintiffs

have refused to participate in this settlement.

The amended complaint alleges that defendants, individually and collectively, are enterprises within the meaning of RICO, 18 U.S.C. §1961(4), and that they have knowingly and willfully participated in the affairs of these enterprises. The alleged pattern of racketeering activity consists of schemes to abandon the offering plan so that a new plan could be submitted later at a higher price, of defrauding prospective buyers, including plaintiffs, and of defrauding the Attorney General. The sponsor purportedly used the requirements imposed by the Nassau County Planning Commission as a way to rescind its legal obligations under the plan, misrepresenting, through fraudulent mailings, what compliance with the requirements would entail.

## II. CONTINUING ENTERPRISE REQUIREMENT

In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), the Supreme Court held that a violation of 28 U.S.C. §1962(c) requires "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Id.* at 46. In a footnote elaborating on the pattern element, the court emphasized the necessity of a continuing relationship. It wrote:

> ...the definition of a "pattern of racketeering activity" differs from the other provisions in §1961 in that it states that a pattern "requires at least two acts of racketeering activity" §1961(5) (emphasis added) ... As the Senate Report explained: ... The infiltration of legitimate business normally requires more than "one racketeering activity and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a

pattern." (Senate Rep. No. 91-617, p. 158 (1969) (emphasis added).

*Sedima*, 473 U.S. at 496, n. 14.

Each circuit has since considered the question of standards for pleading a valid RICO claim, attempting to implement *Sedima's* directive to create a standard for a pattern based on "continuity plus relationship." This has been difficult, in light of the fact that *Sedima* suggested that while narrowing the scope of RICO was the job of Congress, there are dangers in the divergence of RICO from its original intent due to the increasing breadth of predicate offenses. *Id.* at 500.

One circuit has held that if predicate acts are all committed in furtherance of a single scheme, there is insufficient continuity to meet the pattern requirement. *Superior Oil Co. v. Fulmer*, 785 F. 2d 252, 257 (8th Cir. 1986). In another the predicate acts do not need to occur in different criminal episodes or schemes. *Bank of America v. Touche Ross & Co.*, 782 F. 2d 966, 971 (11th Cir. 1986).

Several circuits have taken a middle ground. In *Morgan v. Bank of Waukegan*, 804 F. 2d 970, 975 (7th Cir. 1986), the court stresses that the pattern requirement is a standard, not a rule, holding that "... [r]elevant factors include the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries ..." *Id.* at 975-76. In *Morgan*, the court found that although the acts of mail fraud were distinct, some relating to separate foreclosure sales, and others relating to fraudulent statements made in connection with a loan transaction, they were ongoing over a period of nearly four years, thus satisfying the continuity and relationship aspects of the pattern

requirement. *Id.* at 976.

The Second Circuit requires continuity for both the pattern of racketeering and the enterprise itself. An enterprise with a single purpose, such as fraud, can provide the basis for a Section 1962(c) violation only if the purpose has no obvious terminating goal or date. *United States v. Ianniello*, 808 F. 2d 184, 191-92 (2d Cir. 1986). In *Ianniello*, the enterprise continually skimmed profits from bars and restaurants that it owned and operated in Manhattan. The court found a broad pattern of racketeering activity in the conduct of the enterprise affairs — including predicate acts of mail fraud, bankruptcy fraud, and tax evasion — which also supplied the continuity element, since the enterprise was a continuing operation. *Id.* at 190-91.

The continuing enterprise requirement was not satisfied, however, in *Beck v. Manufacturers Hanover Trust*, 820 F. 2d 46 (2d Cir. 1987), in which the plaintiff alleged a three phase conspiracy to sell United States collateral at an artificially low price, defrauding bond-holders, and depriving the government and people of Mexico of their share of the proceeds of the sale of the collateral. *Id.* at 49. Although the court found that the two related acts of mail and wire fraud satisfied the pleading requirement of racketeering activity, the amended complaint was held to be insufficient, since the enterprise had only one straightforward short-lived goal — the sale of the collateral at a reduced price, and it ceased functioning at the conclusion of the sale. *Id.* at 51. The court stated:

> An enterprise is a group of persons associated together for a common purpose of engaging in a course of conduct ... proved by evidence of an ongoing organization (citations omitted) ... This circuit requires

> that, under Section 1962(c), the enterprise be a continuing operation and that the [predicate] acts be related to the common purpose.

*Beck*, 820 F. 2d at 51, quoting *Ianniello*, 808 F. 2d at 191. *See also Albany Insurance Co. v. Esses and Shoe Tastics, Inc.*, ___ F. 2d ___, slip op. 5711 (2d Cir. Oct. 15, 1987) (dismissing a civil RICO claim even though the mail fraud and arson constituted a pattern, because the defendant's one obvious goal — inducing the plaintiff to pay a false insurance claim — did not constitute a continuing enterprise with regard to criminal activity).

## III. LACK OF CONTINUING ENTERPRISE

Under the standard set forth in *Ianniello* and *Beck*, plaintiffs have adequately pleaded a pattern of racketeering activity. They have alleged multiple episodes of mail fraud, committed in a scheme to defraud plaintiffs and the Attorney General. The acts, even if they were only conducted from 1985, when the first reference to abandonment was made, until 1986, when the Attorney General rescinded the abandonment, were continuous enough over a period of time to establish a pattern of racketeering activity.

Plaintiffs' amended complaint is deficient, however, in its failure to sufficiently allege the continuity of the enterprise's criminal activity. Plaintiff alleges an enterprise — a unit involved with the commencement and abandonment of an offering plan — which defrauded plaintiffs and the Attorney General, and has ceased to function in terms of any criminal activity. The fact that it has ceased to function by operation of law due to the state court settlement is not relevant, since there is no allegation that absent this settlement, this enterprise was to

engage in ongoing criminal activity after the plan of abandonment.

The *Esses* court rejected the argument urged by plaintiffs that the requirement of continuity of criminal activity or purpose is not applicable where the enterprise is a legitimate business. *Esses* at 5711. *See also Mastercraft Industries v. Breining*, ___ F. Supp. ___ No. 86 Civ. 6384 (S.D.N.Y. July 28, 1987) (dismissing complaint alleging fraudulent failure to perform contractual obligations in connection with a real estate transaction for failure to meet the requirement of "continuity of criminal purpose," continuing enterprise element not satisfied merely because the defendant's lawful business is continuing).

## IV. CONCLUSION

Plaintiffs' RICO claims are dismissed as to all defendants with prejudice.

At oral argument, the parties stipulated that all plaintiffs' state claims against all defendants except Schlesinger are dismissed on the merits. Plaintiffs will amend the complaint as to defendant Schlesinger and plead all state law claims against defendant Schlesinger. Jurisdiction will be based on a theory of diversity. Defendant Schlesinger retains the right to challenge the complaint on diversity and all other grounds. Plaintiffs agree that all claims against other defendants are dismissed with prejudice.

So ordered.

Dated: Brooklyn, New York
November 16, 1987

s/_____
Chief Judge, U.S.D.C.